Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In the Supreme Court of the United States

BUD CASH, JR.,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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23 pp

QUESTION PRESENTED FOR REVIEW

I. WHETHER WAIVER OF RIGHT TO GRAND JURY INDICTMENT SHOULD BE PERSONAL AND COULD BE DONE ONLY BY AFFIRMATIVE WAIVER BY THE DEFENDANT HIMSELF.

LIST OF ALL PARTIES TO THE PROCEEDING

The following is a list of all parties to the proceeding in the United States Court of Appeals for the Sixth Circuit whose judgment is sought to be reviewed in this case:

Bud Cash, Jr.

State of Tennessee

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OPINIONS BELOW

The United States District Court for the Eastern District of Tennessee at Chattanooga filed its Order on September 6, 2001 denying the motion to reopen the case and is unpublished and has been reproduced in the Appendix at pp. 5a-7a. The Petitioner filed a Motion for Certificate of Appealability to the United States District Court for the Eastern District of Tennessee at Chattanooga on September 12, 2001. The District Court filed its Order denying the Motion for Certificate of Appealability on October 12, 2001 and is unpublished and has been reproduced in the Appendix at pp. 3a-4a. The Petitioner filed a Notice of Appeal and Motion for Certificate of Appealability on October 19, 2001. The United States Court of Appeals for the Sixth Circuit denied Petitioner's Application for a Certificate of Appealability on January 7, 2003 and is unpublished and has been reproduced in the Appendix at pp. 1a-2a.

SUPREME COURT JURISDICTION

The Order of the United States Court of Appeals for the Sixth Circuit was filed on January 7, 2003. This Petition for Writ of Certiorari is filed pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND/OR STATUTORY PROVISIONS CONSTRUED

Fifth Amendment

Criminal Actions – Provisions concerning – Due process of law and just compensation clauses. – No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment by a grand jury, except in cases arising in the land or naval forces, or in the

militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use; without just compensation.

Fourteenth Amendment

Citizenship – Due process of law- Equal protection. – All persons born or naturalized in the United States, and subject to the jurisdiction therefore, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 28, 1993, the Petitioner filed his Petition for Post-Conviction Relief. The Post-Conviction Relief Petition went only to the aggravated assault conviction on his indictment because the aggravated kidnapping charges had been reversed and remanded for a new trial. On April 27, 1994, the State filed its Response. On November 28, 1994, counsel filed amendments to the Petition for the Petitioner. On April 27, 1994, the Court held an evidentiary hearing. On March 5, 1996, the Court entered its written Order denying the Petitioner's Petition for Post-Conviction Relief. On March 11, 1996, the Petitioner filed his Notice of Appeal to the Tennessee Court of Criminal Appeals. The Court of Criminal Appeals affirmed the decision of the trial court on

October 16, 1997. The Petition to Rehear was filed on October 17, 1997 and denied on November 17, 1997. The Supreme Court of Tennessee denied the Petitioner's Application for Permission to Appeal on April 20, 1998.

On July 27, 1998, the Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. On October 10, 1998, the Petitioner filed a submission of authority. On September 16, 1998, the Respondent filed a Motion to Dismiss for lack of jurisdiction along with a Memorandum of Law and Notice of Filing Documents. On September 21, 1998, the Petitioner filed his Response to Respondent's Motion to Dismiss. On July 26, 1999, the United States District Court for the Eastern District of Tennessee filed its Order and Memorandum Opinion granting Respondent's Motion to Dismiss for lack of subject matter jurisdiction and denying Petitioner a certificate of appealability.

On August 2, 1999, the Petitioner filed his Notice of Appeal. On December 30, 1999, the United States Court of Appeals for the Sixth Circuit denied the application for certificate of appealability, the notice of appeal having been construed as an application for a certificate of appealability. On March 6, 2000, the United States Supreme Court denied Petitioner's writ for certiorari.

On July 20, 2001, the Petitioner filed a Motion to Reopen the case with accompanying Memorandum in Support of the motion. On September 6, 2001, the United States District Court filed an Order denying the Motion to Reopen. (Appendix at pp. 5a-7a)

On September 12, 2001, the Petitioner filed for a certificate of appealability. On September 17, 2001, the

United States District Court filed a Memorandum and Order finding the motion to extend time to file a Motion to Reopen case filed by Petitioner moot. On September 24, 2001, the Respondent filed a response to the Motion for Certificate of Appealability. On October 1, 2001 the Petitioner filed an Addendum to the Motion for Certificate of Appealability. On October 12, 2001, the United States District Court denied the Motion for Certificate of Appealability. (Appendix at pp. 3a-4a)

On October 19, 2001, the Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit and Motion for Certificate of Appealability. On March 27, 2002, the United States Court of Appeals for the Sixth Circuit ordered that the district court treat the application for a certificate of appealability as a notice of appeal and forward it for filing as a new appeal. On June 6, 2002, Petitioner's case was docketed in the United States Court of Appeals for the Sixth Circuit. On June 12, 2002, the Petitioner filed a Motion for Certificate of Appealability.

On January 7, 2003, the United State Court of Appeals for the Sixth Circuit denied the Petitioner's application for a certificate of appealability. (Appendix at p. 1a)

STATEMENT OF FACTS

Bud Cash, Jr. is charged in the Criminal Court for Bradley County, Tennessee with possession of a firearm by a specified convicted felon. In his federal habeas corpus petition, the Petitioner, having exhausted state remedies, challenges the prior conviction which is an essential element of the charged offense. The United States District Court held that the petition should be dismissed without prejudice subject to be refiled if the Petitioner is convicted in the Tennessee

court. The Petitioner submits the petition should be considered now because any conviction in the Criminal Court for Bradley County, Tennessee would be served prior to the opportunity for review under federal habeas corpus.

SUMMARY OF ARGUMENT

Waiver of indictment by a grand jury is a personal right and can be done only by affirmative waiver of the defendant himself. Any implied consent by his attorney should not be effective to waive such an important constitutional right.

Whether this important constitutional right was waived is a matter that should be considered prior to the trial on the new charges in Bradley County, Tennessee by the United States District Court. The United States District Court held that the Petition for Writ of Habeas Corpus as to the prior offense which is an essential element of the charged offense should be dismissed without prejudice to be refiled should the defendant be convicted. If the defendant is convicted, however, any review would come well after his sentence was served.

ARGUMENT

I. WHETHER WAIVER OF RIGHT TO GRAND JURY INDICTMENT SHOULD BE PERSONAL AND COULD BE DONE ONLY BY AFFIRMATIVE WAIVER BY THE DEFENDANT HIMSELF.

Under established Tennessee law, absent either grand jury action or written waiver of the guarantee to the right to an indictment, no conviction can be valid. Tennessee v.

Brackett, 869 S.W.2d 936, 938 (Tenn. Crim. App. 1993) (citing Tennessee v. Morgan, 598 S.W.2d 796 (Tenn. Crim. App. 1979)). Morgan appears to be controlling authority regarding the waiver of the right to an indictment. An indictment is jurisdictional in a criminal case and without a valid indictment no prosecution can be valid. 598 S.W.2d at 797. The court required a written waiver. Id., at 797-798. This writing requirement appears to be absolute and constitutionally grounded. As the court states, "these constitutional rights [Tenn. Const., Art. I §§ 6, 14] may be relinquished only by a valid written waiver." Id., at 798. Morgan has been fairly consistently followed and applied without regard to circumstances. As the Court of Criminal Appeals stated in Tennessee v. Ridley, 791 S.W.2d 32, 34 (Tenn. Crim. App. 1990), "[o]ur rules and our case law require the relinquishment of [a defendant's] right to be in writing. That is, signed by the [defendant]. No amount of evidence will supply a signature when, all agree, none exists."

At the bottom of the requirement for a valid written waiver of the right to an indictment is the right to due process since conviction on an insufficient charge is an obvious denial of due process. Tennessee v. Perkinson, 867 S.W.2d 1, 5 (Tenn. Crim. App. 1992). Recognizing the jurisdictional nature of such errors, the court stated that they could be noticed at any time in the course of a case and that waiver does not apply when an indictment fails to assert an essential element of an offense. Id., at 5-6.

Amendments are permitted, of course, under Rule 7(b), Tenn. R. Crim. P., with the consent of the defendant or, before jeopardy has attached, when the amendment will not charge an additional or different offense and the defendant is not prejudiced. Tennessee v. Kirkland, 696 S.W.2d 544, 545

(Tenn. Crim. App. 1983). See also Tennessee v. Sherman, 656 S.W.2d 47, 49 (Tenn. Crim. App. 1983). In Tennessee v. Beal, 614 S.W.2d 77, 80 (Tenn. Crim. App. 1981), the court appears to have found that Rule 7(b) could be satisfied by implied consent but the court nowhere discusses Morgan. Moreover, the Supreme Court has recognized that defects in an indictment may be waived if not raised prior to a plea on the merits. Tennessee v. Berry, 592 S.W.2d 260, 261-262 (Tenn. Crim. App. 1968) (sufficiency issue waived by failure to object before going to trial); Murff v. Tennessee, 425 S.W.2d 286 (Tenn. 1967) (implied waiver); Tennessee v. Kennedy, 649 S.W.2d 275, 279 (Tenn. Crim. App. 1982), overruled on other grounds, 691 S.W.2d 520, 522 (Tenn. 1984) (waiver by procedural default). The greater weight of Tennessee law appears to be that this waiver does not, however, apply to the legal insufficiency of the indictment, which can be raised at any time. McLean v. Tennessee, 527 S.W.2d 76, 82 (Tenn. 1975). See also McCracken v. Tennessee, 489 S.W.2d 48, 53 (Tenn. Crim. App. 1972).

Federal law on this issue is similar to Tennessee law in most respects. The corresponding federal rule of criminal procedure does, however, prescribe a formal procedure for the valid waiver of the right to an indictment. See, e.g., United States v. Montgomery, 628 F.2d 414, 416 (5th Cir. 1980). Not only must the waiver occur in open court, but the trial court has the obligation of affirmatively determining that the waiver was knowingly, understandingly, and voluntarily made. United States v. Moore, 37 F.3d 169, 173 (5th Cir. 1994). In Moore, the timing of the filing of a signed waiver under Rule 7(b) was at issue in ambiguous circumstances and substantial compliance was all that was required in light of the defendant's acquiescence in the procedure. Id. In United States v. Liboro, 10 F.3d 861, 863-864 (D.C. Cir. 1993), the court was faced with ambiguous compliance with Rule 7(b)

but an executed waiver existed and the defendant had been personally addressed by the court on the issue.

Since the record in this case is clear that no written waiver was executed personally by the defendant at any point in the proceedings after a valid objection had been asserted to the indictment, Tennessee law would require a finding that the conviction on the amended count is invalid and that the trial court lacked jurisdiction over this charge. Tennessee Rule 7(b) does not appear to require any particular procedure; however, the written waiver, would appear to at least require some formality in assuring the voluntariness and validity of a waiver. Cf. Tennessee v. Neal, 810 S.W.2d 131, 138 (Tenn. 1991), overruled on other grounds, 858 S.W.2d 879 (Tenn. 1993). Because the defendant was never personally addressed in any manner to assure that the waiver was valid, under State law, the defendant's counsel had no authority to waive the right on behalf of the defendant.

This petition should be reviewed prior to any trial in the Tennessee court instead of after a conviction because conviction after review could not be accomplished before any sentence was served. The District Court should be instructed, after full review by this Court, to consider the habeas corpus petition prior to any trial in the State court in Tennessee.

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 02-5699

[Filed January 7, 2003]

BUD CASH, JR.,	)
Petitioner-Appellant,	)
	)
v.	)
	)
STATE OF TENNESSEE,	)
Respondent-Appellee.	)
	)

ORDER

Bud Cash, Jr., a Tennessee state prisoner, appeals a district court judgment denying his petition for a writ of habeas corpus. Cash applies for a certificate of appealability. Fed. R. App. P. 22(b).

An individual seeking a certificate of appealability is required to make a substantial showing of the denial of a federal constitutional right. *See* 28 U.S.C. § 2253(c)(2); *Barefoot v. Estelle,* 463 U.S. 880, 893 (1983). The record before the court does not meet this standard for the reasons stated by the district court in its order of September 6, 2001.

Upon review, the application is hereby denied because Cash failed to make a substantial showing of the denial of a federal constitutional right.

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

[Filed October 12, 2001]

No. 1:98-cv-251
Collier

BUD CASH, JR.,)
Petitioner,)
)
v.)
)
STATE OF TENNESSEE)
Respondent.)
)

MEMORANDUM AND ORDER

Bud Cash, Jr., ("Cash") filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 which this Court dismissed on July 26, 1999, and denied a certificate of appealability (Court File No. 22). Cash, by and through counsel, Douglas A. Trant, filed a motion to reopen (Court File No. 27) which the Court denied on September 6, 2001.

Petitioner, by and through counsel, has filed a motion for certificate of appealability (Court File No. 33). This Court previously determined that petitioner failed to make a

substantial showing of the denial of a constitutional right and petitioner has not presented evidence which changes that determination. Thus, this Court DENIES him a certificate of appealability. Fed. R. App. P. 22(b).

SO ORDERED.

ENTER.

/s/ _____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

[Filed September 6, 2001]

No. 1:98-cv-251
Collier

BUD CASH, JR.,
Petitioner,

v.

STATE OF TENNESSEE
Respondent.

ORDER

The Court has received a motion to reopen petition to vacate judgment pursuant to 28 U.S.C. § 2254 (Court File No. 27), and submission of additional authority in support of petition to vacate state of Tennessee judgment pursuant to 28 U.S.C. § 2254 (Court File No. 28) on behalf of Bud Cash, Jr., ("Cash"), by and through his attorney, Douglas A. Trant. Cash was convicted by a jury in Bradley County Criminal Court, on March 10, 1990, for aggravated assault. Cash was convicted of aggravated assault and received a six year sentence. Cash seeks to have this 1990 conviction and

sentence set aside on the grounds he did not personally waive his right to a grand jury indictment.

Cash previously Fried a petition under 28 U.S.C. § 2254 for a *writ of habeas corpus* by a person in state custody (Court File No. 1), The respondent filed a motion to dismiss for lack of jurisdiction because the petitioner was not "in custody" for the aggravated assault conviction and in the alternative, on the grounds of procedural default (Court File No. 6). Petitioner's first petition for federal habeas corpus relief was dismissed. *Bud Cash, Jr., v. John Knox Walkup,* Civil Action No. 1:98-cv-251 (E.D. Tenn. 1999). The Court dismissed the petition on July 26, 1999, for lack of subject matter jurisdiction because Petitioner was not "in custody" for purposes of § 2254 jurisdiction (Court File No. 22). The United States Court of Appeals for the Sixth Circuit denied his application for a certificate of appealability on December 27, 1999 (Court File No. 24), and the Supreme Court of the United States denied his petition for a writ of certiorari on March 6, 2000 (Court File No. 26).

Presently before this Court is a motion to reopen petition to vacate judgment pursuant to 28 U.S.C., § 2254 (Court File No. 27), and submission of additional authority in support of petition to vacate state of Tennessee judgment pursuant to 28 U.S.C. § 2254 (Court File No. 28). Cash is attempting to file a second petition for federal habeas corpus relief challenging his 1990 conviction and sentence for aggravated assault. In his first habeas corpus petition he alleged that since he was never personally addressed regarding the waiver to grand jury indictment, under state law his counsel had no authority to waive the right on his behalf so the conviction should be vacated. Cash presumably contends the Court now has jurisdiction because he is now in custody pursuant to the judgment he attacks since he has been placed

on bond on pending charges and "because the prior convictions would... be used as an essential element of the offense. In that regard the Defendant would also argue that *Apprendi v. New Jersey,* 530 U.S. ___, 147 L.Ed. 2d 435, 120 S.Ct. 2348 (2000) which requires that any essential element of the offense which must be proved has to be submitted to a jury for their determination."

The petitioner has failed to show his "in custody" status has changed since the Court dismissed his first § 2254 petition. Furthermore, he is essentially attacking his pending state criminal proceedings, and not his 1990 conviction for aggravated assault.[1] Accordingly, the motion to reopen (Court File No. 27) is DENIED.

SO ORDERED.

ENTERED:

/s/ _____
CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

---

[1] To the extent Petitioner is attempting to file a second § 22.54 petition regarding his 1990 aggravated assault conviction and sentence, he has failed to follow the proper procedures_ The Antiterrorism and Effective Death Penalty Act, effective April 24, 1996, requires a petitioner to obtain permission in the United States Court of Appeals for the Sixth Circuit for an order authorizing this Court to consider the petition. 28 U.S.C. § 2244(b)(3); *also see Lyons v. Ohio Adult Parole Authority,* 105 F.3d 1063, 1066 (6th Cir. 1997). This Court has not received an order from the Sixth Circuit authorizing the Court to consider the pending petition.